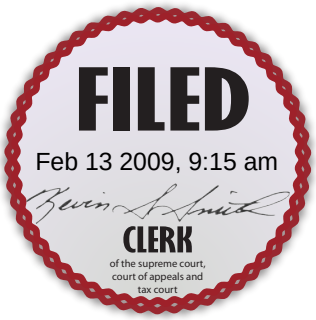

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IN THE COURT OF APPEALS OF INDIANA

ARTHUR F. ELDER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A05-0804-CR-187
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT NO. 1
The Honorable Steven R. Nation, Judge
Cause No. 29D01-0702-FB-10

February 13, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Arthur F. Elder (Elder), appeals his conviction and sentence for arson, as a Class B felony, Ind. Code § 35-43-1-1.

We affirm.

ISSUES

Elder presents two issues for our review:

(1) Whether the State presented sufficient evidence to support Elder's conviction for arson; and

(2) Whether Elder's sentence is inappropriate in light of the nature of his offense and his character.

FACTS AND PROCEDURAL HISTORY

The following is the evidence most favorable to the jury's verdict. On the night of February 11, 2007, Elder and his wife, T.E., went to T.E.'s sister's house with their two children and T.E.'s thirteen-year-old daughter from a previous relationship, F.S. On the way back to T.E.'s house in Atlanta, Indiana, Elder was drunk, and he began yelling and screaming.[1] T.E. hit the brakes of the Blazer they were in, and Elder punched and cracked the windshield. Once they were inside T.E.'s house, "there was a lot of screaming and fighting going on," and Elder got into a physical altercation with T.E. and F.S. (Transcript pp. 32-33). F.S. was able to escape into the bathroom with her cell phone, and T.E. left the

[1] At the time, T.E. and Elder were separated and in the process of getting divorced, but Elder frequently spent the night at T.E.'s house.

house and went next door to the home of Steve Clos (Clos). When F.S. came out of the bathroom, Elder "jumped on top of [her] and he started smashing her head into the ground." (Tr. p. 117). F.S. was again able to escape, and she ran to Clos' house. The other children also made their way to Clos' house.

While T.E. and her children were inside Clos' house, Elder was outside going back and forth between the two houses. Outside of T.E.'s house, he "started beating on the Blazer and the little pickup truck they had." (Tr. p. 149). Eventually, Elder went to Clos' house and pushed the door open as F.S. attempted to lock it. Elder "took T.E. to the ground and started hitting [her] head into the oven door[.]" (Tr. p. 35). Clos pulled Elder off of T.E. and threw him out of the house. When Elder saw F.S. on her cell phone, he said, "I guess they'll be finding your body along with your mom's in the ashes." (Tr. p. 120). Elder then started hitting the vehicles outside with a hammer.

At some point, Elder returned to Clos' house and yelled at T.E., "Look at your couch now, b****." (Tr. p. 50). T.E. looked through the window of her trailer, and she saw that her couch was on fire. T.E. went to her house with a fire extinguisher, where she found Elder attempting to put the fire out. T.E. used the fire extinguisher to put the fire out and then returned to Clos' house. Minutes later, Elder again returned to Clos' house and told T.E. to "look at [her] house." (Tr. p. 54). This time, T.E.'s house was on fire. The house was destroyed, and Clos' van and T.E.'s pickup were damaged. Elder fled the scene, but he was eventually apprehended two miles from T.E.'s house. Police found two lighters in Elder's jumpsuit.

On February 12, 2007, the State filed an Information charging Elder with: Count I, arson, as a Class B felony, I.C. § 35-43-1-1(a)(1); Count II, battery resulting in bodily injury, as a Class D felony, I.C. § 35-42-2-1(a)(2)(B), based on his battery of F.S.; Count III, domestic battery, as a Class A misdemeanor, I.C. § 35-42-2-1.3(a), based on his battery of T.E.; Count IV, criminal mischief, as a Class B misdemeanor, I.C. § 35-43-1-2(a)(1), based on damage to Clos' van; and Count V, criminal mischief, as a Class B misdemeanor, I.C. § 35-43-1-2(a)(1), based on the damage to the pickup and the Blazer.

A jury trial was held from October 1-3, 2007. The jury found Elder guilty of all five counts. On March 13, 2008, the trial court sentenced Elder as follows: fifteen years for arson as a Class B felony, three years for battery as a Class D felony, one year for domestic battery as a Class A misdemeanor, and 180 days for each count of criminal mischief as a Class B misdemeanor, with all sentences to run concurrently, for a total executed sentence of fifteen years.

Elder now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Before we address the merits of the appeal, we note that Elder's attorney included a copy of the presentence investigation report on white paper in the Appellant's Appendix. In *Hamed v. State*, 852 N.E.2d 619, 621 (Ind. Ct. App. 2006), we explained:

> Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the

presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> > (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
> >
> > (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

We ask that counsel follow this procedure in the future.

I. *Sufficiency of the Evidence*

Elder first argues that the State presented insufficient evidence to support his conviction for arson.[2] In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 213-14 (Ind. Ct. App. 2007), *trans. denied*. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support

[2] Elder does not appeal his other convictions.

the judgment. *Id*. at 214. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id*.

Elder was charged under Indiana Code subsection 35-43-1-1(a)(1), which provides that a person who, by means of fire, explosive, or destructive device, knowingly or intentionally damages a dwelling of another person without the other person's consent commits arson, a Class B felony. Elder argues that the State presented insufficient evidence to prove that he started the fire or that he did so knowingly or intentionally. He is incorrect. Arson is almost always subject to proof by circumstantial evidence, and we defer to the jury's determination that the defendant set the fire. *Belser v. State*, 727 N.E.2d 457, 464 (Ind. Ct. App. 2000), *trans. denied*. Here, there is a great deal of circumstantial evidence supporting the jury's determination.

First, Elder's behavior on the night of February 11, 2007, is best characterized as a violent, drunken rampage. He yelled and screamed at his wife and kids, cracked a windshield with his fist, battered vehicles, and physically attacked his wife and stepdaughter in two different houses. This evidence shows, if nothing else, that Elder was ready, willing, and able to inflict serious damage on people and property.

Second, Elder's statements during his rampage point toward his guilt. F.S. testified that Elder told her, "I guess they'll be finding your body along with your mom's in the ashes." (Tr. p. 120). The jury could have reasonably concluded that Elder's comment about ashes was indicative of an intent to burn something. Moreover, T.E. first learned of the initial fire when Elder yelled, "Look at your couch now, b****." (Tr. p. 50). Also, minutes

after T.E. put out the initial fire with a fire extinguisher, Elder returned and yelled at her to "look at [her] house." (Tr. p. 54). The jury could have reasonably concluded that Elder was claiming responsibility for the fire.

Third, flight may be considered as circumstantial evidence of consciousness of guilt. *Jones v. State*, 485 N.E.2d 627, 628 (Ind. 1985). Elder does not dispute that he fled from the scene shortly after the second fire began.

Fourth, the evidence shows that the fire started as Elder was going back and forth between the two houses in a drunken rage, while everyone else was taking shelter inside Clos' house. In addition, when Elder was apprehended, he had two lighters. While neither of these facts definitively shows that Elder started the fires, they certainly constitute circumstantial evidence supporting Elder's guilt.

In sum, we conclude that the State presented sufficient evidence to support Elder's conviction for arson. *Cf. Belser*, 727 N.E.2d at 465 (concluding that defendant's arson convictions were supported by defendant's presence at the scene, his conduct before and after the fire, proof that the fire was intentionally set, and motive).

Finally, we pause to address a related argument by Elder. He contends that his efforts to put out the initial fire were "actions that are inconsistent with guilt. That is, it is unreasonable to infer that a person committing the knowing or intentional act of arson would try to put out the fire he set." (Appellant's Br. p. 6). Elder would have us make one of two inferences: that he had nothing to do with starting the fire and was actually trying to prevent it, or that, while he initially acted with bad intent, his later efforts to put the fire out erased his

criminal intent. But even if we were to make one of those inferences, there is still the matter of the second fire. Elder does not claim that he tried to put out the second fire. It is the second fire that destroyed T.E.'s house, and, as discussed above, the State presented sufficient circumstantial evidence to support a jury finding that Elder started both fires. As such, we affirm Elder's conviction for arson.

II. *Appropriateness of Elder's Sentence*

Next, Elder contends that, even if there is sufficient evidence to support his conviction for arson, his fifteen-year sentence for that conviction is inappropriate.[3] Indiana Appellate Rule 7(B) permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *See* Ind. Appellate Rule 7(B); *see also Childress v. State*, 848 N.E.2d 1073, 1079 (Ind. 2006). The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress*, 848 N.E.2d at 1080. Elder has failed to carry this burden.

Elder's argument focuses on his attempt to put out the first fire, arguing that it "renders the nature of this arson less severe than one where the evidence is more clear that the fire was knowing or intentional." (Appellant's Br. p. 6). But any positive light that this fact sheds on Elder is drowned out by the remainder of Elder's behavior and his previous criminal record. Even before the fire, a drunken Elder damaged multiple vehicles and

[3] Elder does not challenge the sentences for his other convictions. We also note that, in his reply brief, Elder questions the adequacy of the trial court's sentencing statement. "No new issues shall be raised in the reply brief." Ind. Appellate Rule 46(C).

violently battered his wife and his thirteen-year-old stepdaughter. All this by a man who was on supervised parole following an eighteen-year sentence in Texas for two convictions of injury to a child. Elder's criminal record also includes earlier adult convictions for auto theft and burglary and a juvenile adjudication for auto theft. As the trial court noted, Elder's crimes have escalated from crimes against property to crimes against people. Exactly how dangerous Elder can be was revealed on the night of February 11, 2007. We cannot say that Elder's sentence is inappropriate.

CONCLUSION

Based on the foregoing, we conclude that the State presented sufficient evidence to support Elder's conviction for arson and that Elder's fifteen-year sentence for that conviction is not inappropriate.

Affirmed.

DARDEN, J., and VAIDIK, J., concur.